IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CARL DEAN SCHLOBOM, Appellant.	)	2 CA-CR 2006-0104 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200500143

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Robert A. Walsh — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Appellant Carl Schlobom was convicted after a jury trial of first-degree murder, kidnapping, and two counts of aggravated assault.[1] The trial court sentenced him to prison for a term of natural life plus five additional years. On appeal, Schlobom asserts

[1]Schlobom was acquitted of a third count of aggravated assault.

the trial court erred in admitting inadmissible hearsay statements by a co-conspirator, in admitting Schlobom's statement that he was a debt collector for drug dealers, and in denying his motion for a mistrial based on a statement by the prosecutor. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdict[s]." *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On February 7, 2005, the owner of a storage facility discovered the body of Sammy J. on the floor of one of the facility's empty storage lockers. Schlobom, Noel Alcarez-Guerrero, and Antoinette Newcomb all were later arrested and charged with Sammy's murder.

¶3 Schlobom met his fiancée, Sarah B., when Sammy introduced them. Sarah had known Sammy for about nine years. Schlobom was jealous, however, that Sammy "was part of [her] life" and there was "tension when Sammy was around." Schlobom mentioned to Sarah and others that he wanted to harm Sammy. On more than one occasion, Sarah had heard Schlobom angrily refer to Sammy as a "snitch," a charge that Schlobom often repeated to others. In late January 2005, Sarah pawned her television set to help Sammy post bond to get out of jail, further upsetting Schlobom.

¶4 When Sammy was released from jail, he was "a little bit beaten up from being in jail," including having black eyes and pain in his stomach or side. On February 4, Sammy went to Janae B.'s house to get a ride to a hospital for his injuries. Sammy, however, knowing that Newcomb wanted to talk with him about a stolen credit card and a phone,

instead accompanied Janae and her friend Ana M. to Newcomb's nearby house. Newcomb had previously been overheard saying that "she wanted Sammy dead."

¶5 Once the three arrived at Newcomb's house, they drank some alcohol and used some methamphetamine Newcomb provided. At some point, Janae and Ana went into a bedroom, where they remained for much of the upcoming incident. Sammy and Newcomb remained in the living room. Newcomb began to yell at Sammy regarding the stolen credit card and phone, and Sammy apologized. Newcomb asked Ana to summon her boyfriend, Alcarez-Guerrero, to the house. Alcarez-Guerrero was also angry at Sammy because he believed Sammy had stolen his car stereo and speakers.

¶6 Once Alcarez-Guerrero arrived, those present used more methamphetamine. Alcarez-Guerrero confronted Sammy about the stereo and joined Newcomb in yelling at Sammy. Ana later heard noises that sounded like kicking and punching. When she went into the living room, she saw Sammy sitting on a couch, crying, with duct tape binding his hands behind his back and blood coming out of his mouth.

¶7 At about 6:30 p.m., Newcomb went to Schlobom's house and they left to go to Newcomb's house in separate vehicles. Both Janae and Ana saw Schlobom at Newcomb's house, and Ana later heard more sounds of fighting while she was in the bedroom. Ana heard Newcomb thank Schlobom for coming. She also heard Newcomb tell Schlobom and Alcarez-Guerrero that she would pay them in "either money or dope." Ana then heard Newcomb say she wanted Sammy dead and heard Schlobom say, "I'll take care of it for you." Soon after, Ana and Janae left the house "[t]o get away from what was happening."

¶8 While at Newcomb's house, Schlobom made three telephone calls in the evening to James L. Schlobom told James they had Sammy "duct-taped" and unconscious, and he invited James to "join in the fun." In the last call, Schlobom asked James if he knew "where there was a mine shaft." James did not believe Schlobom was serious and did not go to Newcomb's home.

¶9 Schlobom later told James and Cherisee J. that he, Alcarez-Guerrero, and Newcomb had used a bat or stick to beat Sammy and that he and the others had killed Sammy. A later autopsy of Sammy revealed he had died of ligature strangulation and had six fractured ribs. Schlobom had taken off Sammy's watch and kept it "as a trophy, as a souvenir." Schlobom also told Cherisee he had written or carved the word "snitch" on Sammy; police officers discovered the word "snitch" written on Sammy's chest.

¶10 Schlobom had previously rented units in the storage facility where Sammy's body was discovered in an empty and unlocked unit. Surveillance cameras in the storage facility captured Schlobom at approximately 9:45 p.m. on February 4 in front of the unit where the body was later discovered. Numerous witnesses identified Schlobom from the surveillance video based on both his face and distinctive attire. Schlobom had returned home alone after 10 p.m., looking "tired [and] sweaty," and driving Newcomb's vehicle.

¶11 Although Schlobom, Alcarez-Guerrero, and Newcomb were all charged with Sammy's murder, they were tried separately. Schlobom testified at trial that Sammy was dead before Schlobom arrived at Newcomb's house. He denied making the incriminating statements about the killing Cherisee and James attributed to him, but admitted he had

accepted Newcomb's offer to dispose of Sammy's body for approximately $5,600 worth of methamphetamine.

Discussion

Co-Conspirators' Statements

¶12 Schlobom contends the court erred "by allowing into evidence unsubstantiated hearsay statements by co-conspirators," apparently referring to Ana and Janae. However, Schlobom has not identified which specific statements he thinks were inadmissible. Instead, he has simply recited all of their testimony, consisting in part of their personal observations based on their presence at the scene of the incident. These statements are clearly not hearsay. *See* Ariz. R. Evid. 801(a), 17A A.R.S. ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Nor has Schlobom provided us with a standard of review or any meaningful legal analysis of this issue. We therefore conclude that he has waived this issue on appeal and do not address it further. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim."); Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S. (appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities,

statutes and parts of the record relied on. . . . With respect to each contention raised on appeal, the proper standard of review on appeal shall be identified.").[2]

Evidence of Prior Acts

¶13 Schlobom also asserts the trial court erred "in allowing evidence of alleged other bad acts." He contends James's testimony that Schlobom had told him he worked in security and collected drug debts was improper character evidence pursuant to Rule 404(b), Ariz. R. Evid., 17A A.R.S. This rule provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. Over Schlobom's objection, the trial court allowed the testimony, finding it could "establish possible motivation," and "the probative value of this evidence outweighs any danger of unfair prejudice." "The admission of prior . . . acts evidence is within the trial court's discretion, and this court will not reverse the exercise of that discretion absent an abuse." *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992).

¶14 On appeal, and as it did in the trial court, the state argues that Schlobom's representing himself "as a 'bill collector' for drug-debts . . . demonstrate[d] [his] motive and intent to kill Sammy." "Although motive is not an element of a crime, a trial court may admit

[2]We also note Schlobom did not object to much of Ana's testimony at trial, and none of Janae's, and even solicited from Ana additional statements she had heard from Newcomb and Alcararez-Guerrero, apparently to bolster Schlobom's defense that Sammy was dead before Schlobom arrived at Newcomb's house.

evidence of a defendant's other misconduct if the misconduct furnished or supplied the motive for the charged crime." *State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995).

¶15 Schlobom asserts the only evidence of motive adduced at trial was that he was jealous of Sammy and that Newcomb and Alcarez-Guerrero thought Sammy had stolen their property. Schlobom argues there was no evidence "that [he] was motivated to murder Sammy because he believed he was a snitch." We disagree. The fact that Sammy's body was found with the word "snitch" written on it could readily be construed as a possible motive for a self-professed drug enforcer to commit the crime. This is true even if, as Schlobom argued at trial, Sammy "was not working for any law enforcement agency"; what is meaningful in this analysis is what Schlobom may have believed, not whether his belief was correct. Moreover, Sarah testified that Schlobom had repeatedly referred to Sammy as a "snitch."

¶16 Schlobom also contends "there was no evidence that [Newcomb] or [Alcarez-Guerrero] summoned [Schlobom] because he was their enforcer." There was, however, evidence that Newcomb was a drug dealer, that she had driven to Schlobom's house to get him to go to her house while Sammy was already there, and that Newcomb planned to pay Schlobom to injure or kill Sammy. This evidence was consistent with, and tended to support, the state's argument that Schlobom, as a drug enforcer, had a motive to kill Sammy.[3]

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[3]To the extent Schlobom is arguing that this testimony was inadmissible because James did not believe him and thought he was only bragging, this claim has no merit. *See State v. Johnson*, 121 Ariz. 545, 546-47, 592 P.2d 379, 380-81 (App. 1979) (defendant's

¶17 Schlobom asserts that, even if the evidence of motive was relevant, it should be excluded under Rule 403, Ariz. R. Evid., 17 A.R.S., as unfairly prejudicial. This rule provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Id*. "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). "But not all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). We agree with the state that, because Schlobom's defense was that he had only helped Newcomb and Alcarez-Guerrero dispose of Sammy's body, the trial court could reasonably conclude that his possible motive to kill Sammy in Schlobom's role as a drug enforcer was highly probative and was therefore not outweighed by any danger of unfair prejudice. *See Schurz*, 176 Ariz. at 52, 859 P.2d at 162 (when defendant attempted to "shift responsibility" for murder to another, prior act evidence "had enough probative value to withstand any Rule 403 weighing process"); *see also State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996) (admission of testimony that defendant failed to pay child support obligations not a Rule 403 violation because it was evidence of motive for murder and rebutted claim that defendant did not need money).

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statement that he had shot someone in the past admissible as prior act evidence, "though there was no showing that appellant had in fact shot anyone in the past, and it appeared that he was merely 'puffing'"); *see also State v. Sanchez*, 130 Ariz. 295, 300, 635 P.2d 1217, 1222 (App. 1981) ("It was not necessary to show that appellant had actually committed any prior . . . act since he boasted that he had.").

Denial of Motion for Mistrial

¶18 Schlobom contends the court erred in denying his motion for a mistrial based on a statement made by the prosecutor. On February 3, the third day of trial, the court asked if the state had any more witnesses. Deputy County Attorney Doyle Johnstun told the court that there were "a couple [of] other short points . . . [which] [Chief Criminal Deputy Attorney] Festa [would] cover," and that Johnstun still had to examine Detective Sean Brownson. These "short points" were apparently two stipulations as to the anticipated testimony of two Sierra Vista Police Department officers. After the court asked which should take place first, Johnstun stated, "I'll let Mr. Festa [go first] so that the other officers [who would not have to testify because of the stipulations] can go protect my house." Schlobom did not comment about this statement at the time it was made.

¶19 On the next trial day, after a discussion of jury instructions, Johnstun brought to the court's attention that he may have "messed up" when he "was trying to be funny" the previous day. Johnstun told the court he "just mean[t] [the officers could go] back to work patrolling the streets" but was willing "to tell the jury [he had not been threatened]" "or however [defense] counsel wants it handled." The court stated it had taken the remark as a joke and commented that "there was a chuckle or two from the jury." Counsel for Schlobom stated he had not heard the remark, although the court "assume[d] that [the jurors] all heard it." Schlobom then moved for a mistrial, which the court denied. The court proposed that either it or Johnstun would explain the remark to the jury, but Schlobom declined the court's offer, stating he did not want the statement to be reemphasized.

¶20 "A declaration of a mistrial . . . is 'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

> In determining whether remarks made by counsel in a criminal case are so objectionable as to warrant a new trial, the trial court should consider (1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks.

State v. Hansen, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). "The trial court is in the best position to determine whether an attorney's remarks require a mistrial, and its decision will not be disturbed absent a plain abuse of discretion." *Id.* at 297, 751 P.2d at 957.

¶21 We cannot say the trial court erred in denying Schlobom's motion for a mistrial. Although we agree with Schlobom that Johnstun's remark was inappropriate, it did not refer specifically either to Schlobom or the other people charged with Sammy's murder. The trial court was in the best position to judge the effect of the remark. We note that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 1873 (1974). And, this was one isolated remark amid a lengthy, five-day trial. *See Brecht v. Abrahamson*, 507 U.S. 619, 639, 113 S. Ct. 1710, 1722 (1993) (prosecutor's improper references to defendant's post-arrest silence not reversible error when

they "were infrequent, comprising less than two pages of the 900-page trial transcript in this case"); *Hall v. Whitely*, 935 F.2d 164, 165-66 (9th Cir. 1991) (prosecutor's comment about defendant's heroin use was "isolated moment in a three day trial"). The trial court did not clearly abuse its discretion in denying Schlobom's motion for a mistrial. *See Hansen*, 156 Ariz. at 297, 751 P.2d at 957.

Disposition

¶22 We affirm Schlobom's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PETER J. ECKERSTROM, Judge